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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2022

DOROTHY S. BUCHER, *et al.*,

Petitioners,

—against—

FORREST N. SHUMWAY, *et al.*,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Signal Companies, Inc. ("Signal"), Gulf + Western Industries, Inc. ("Gulf + Western") and the individual Signal and Gulf + Western respondents respectfully request the Court to deny the petition for a writ of certiorari to review the judgment, entered on March 25, 1980, of the United States Court of Appeals for the Second Circuit unanimously affirming a judgment on the pleadings dismissing the Complaint in this action for failure to state a claim under the federal antitrust or securities laws.

Questions Presented for Review

(a) Whether a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit unanimously affirming the dismissal of the Complaint in this action for failure to state a claim under the federal antitrust or securities laws, when that decision creates no conflict with the decision of any federal court but rather follows consistent precedent?

(b) Petitioners also allege that the Court of Appeals acted with "inattentiveness" and "without the minimum of care required" in reviewing various discretionary rulings by the district court. Respondents believe this contention is frivolous and similarly unworthy of review by certiorari.

Federal Statutes Involved

In addition to the statutes set out in the Petition, this action also involves consideration of Section 2 of the Sherman Act, 15 U.S.C. § 2, and Sections 9(a)(6), 14(d)(2) and 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(a)(6), 78n(d)(2), 78n(d)(7). These statutes are set out in the Appendix to this Brief.

Statement of the Case

This action arises out of tender offers made in April, 1976 by Signal and Gulf + Western to purchase shares of Signal's common stock (App C, 17a).[1] The offers were made in a single document, entitled "Offers to Purchase for Cash a Combined Total of 6,400,000 Shares of Common Stock of The Signal Companies, Inc. at $20 Per Share Net by The Signal Companies, Inc. and Gulf + Western Industries, Inc." (the "Offers To Purchase") (App C, 17a).

A review of the Complaint and the decisions below establishes that there are no "special and important reasons" for granting a writ of certiorari (Supreme Court Rule 17). Nothing petitioners have presented falls "within the category of questions of such gravity and general importance as to require review of the conclusions of the Circuit Court of Appeals in reference to them." *In Re Woods*, 143 U.S. 202, 206 (1892). No conflict exists between the decision below, which involved the application of settled principles of law to the facts of this particular case, and any decision of the Court or any lower federal court. Rather, this action is typical of those in which plaintiffs have sought unsuccessfully to stretch the federal securities or antitrust laws to obtain a federal forum for what are at best state law claims for breach of fiduciary duty. The Court of Appeals (Judges Kaufman, Meskill and Brieant) unanimously affirmed, on the opinions of the district court, the view that this action should be pursued, if at all, in a state court.

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1 Citations to "Pet" refer to pages of the Petition for a writ of certiorari. Citations to "App" refer to pages of the Appendix to the Petition.

A. The Complaint

The Complaint (App D, 36a-46a), filed as a purported class action, alleges in a single set of substantive allegations, pleaded solely on information and belief, that the tender offers were part of a fraudulent scheme to entrench Signal management in power. The purpose of this conspiracy was, according to petitioners, a classic violation of common law fiduciary duties. Thus, Paragraph 9 of the Complaint (App D, 41a) alleges:

> The purpose of such conspiracy and course of conduct was to enable Signal and Gulf + Western to buy about one third of Signal's outstanding stock at a non-competitive price, below its fair value, and to protect the control of Signal by Signal Management. The purpose of Signal and Gulf + Western were [*sic*] to be achieved at the expense of the stockholders of Signal, members of the class represented by plaintiffs.

Included among the state law claims are four allegations that the same operative facts constituted violations of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (the "Exchange Act") (App D, 42a-43a) in that the Offers To Purchase omitted to state that:

> (i) respondents' "true purpose" was to consolidate Signal management's control of Signal;
>
> (ii) persons or corporations other than the offerors were "interested" in acquiring Signal or its stock;
>
> (iii) the price of $20.00 per share was below the "true value" of Signal stock; and

(iv) Gulf + Western would have offered a higher price per share if it were not required by Signal's management to support such management.

Finally, by the addition of a few words to their single count complaint, petitioners claim to have stated a *per se* violation of the Sherman Act as well. Their antitrust theory is that simply by offering the same price for a portion of Signal's shares, Signal and Gulf + Western "fixed the price" of the 20,000,000 outstanding shares of Signal stock (App D, 42a).

Although the action was commenced while shares were being purchased pursuant to the Offers To Purchase, petitioners did not seek preliminary injunctive relief. The Complaint, however, seeks treble damages and attorneys' fees, (App D, 45a) and petitioners have described the damages they are claiming as "enormous", involving at least 50 to 100 million dollars. Neither the SEC, the Department of Justice nor the Federal Trade Commission commenced any legal proceeding against any respondent as a result of the tender offers, or expressed any interest in this action after it was commenced.

B. The Tender Offers

On April 12, 1976, Signal and Gulf + Western[2] issued a press release stating that each intended to make a cash tender offer to purchase shares of Signal common stock

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2 Signal is principally engaged through its subsidiaries in the design and manufacture of heavy-duty trucks and aerospace products, and in providing services to the petroleum and petrochemicals industry. Gulf + Western is a diversified company engaged, among other things, in the financial services and leisure time markets. Neither Signal nor Gulf + Western is in the investment banking or securities business.

(App G, 50a-51a). Four days later, on April 16, 1976, the Offers To Purchase were distributed to Signal shareholders whereby Signal and Gulf + Western sought to acquire a combined total of 6.4 million of the approximately 20 million outstanding shares of Signal stock at a price of $20 per share. Signal offered to purchase the first 2.5 million shares that were tendered and Gulf + Western the next 3.9 million shares (App B, 4a; App C, 17a-18a). The $20 per share offering price represented more than a 25% premium over the reported closing price of $15.87 for Signal common stock on April 9, 1976, the last day of trading before the April 12, 1976 press release was issued.

The Offers To Purchase stated that both Signal and Gulf + Western were making the tender offers for investment purposes (App E, 47a; App G, 51a). The allegedly "fixed" price of $20 a share and the allocation of the shares to be purchased were prominently set forth in the Offers To Purchase. In addition, the Offers To Purchase revealed all salient provisions of an agreement between Signal and Gulf + Western that would have the effect of providing additional support for existing management. In accordance with the agreement, Gulf + Western agreed not to acquire, without the prior written consent of Signal, more than 20% of Signal's shares or to seek representation on the Board of Directors of Signal, and stated Gulf + Western's intention to vote in favor of, and support, Signal management (App C, 25a-26a). The Offers To Purchase also clearly stated that Signal was making no recommendation that any shareholder tender his shares in response to the offers.

During the tender offers and thereafter, Signal stock was listed and actively traded on the New York Stock

Exchange and other public exchanges. Signal shareholders had the option to tender, to sell their shares on the market or to retain their shares. Signal and Gulf + Western had sought to acquire 32% of the outstanding Signal shares, but as a result of an apparent lack of interest only about 10% were actually tendered.

C. The Decisions Below

Judge Tenney correctly noted that petitioners failed to cite any authority to support their antitrust claim, but merely "trumpet[ed] the sweeping interdictions of the Sherman Act against all forms of price fixing." (App B, 6a) He observed, however, that the evils to which the antitrust laws are directed are restraints on "business competition in a relevant market segment of the general trade or business of the nation." (*Id.*) (citation omitted).

Judge Tenney concluded that business competition in a relevant market was not restrained here because, *inter alia*, (*i*) neither the purchasers nor the sellers were business competitors or engaged in the business of purchasing or selling Signal shares as an on-going trade; (*ii*) the purchases of Signal stock were made for investment; and (*iii*) the tender offers were not the only market for Signal shares since the shares continued to be traded at all times on the New York Stock Exchange and other exchanges. (App B, 7a, 12a-13a)

Judge Lowe, to whom this case was subsequently reassigned, carefully analyzed each of plaintiffs' four specific federal securities law allegations and determined, in light of the disclosures actually made in the Offers To Purchase, that none was sufficient to state a claim (App C, 23a-31a). Then, Judge Lowe also analyzed the

Complaint as a whole, and found that, at best, "it is essentially an allegation that Signal, aided by Gulf + Western, breached a fiduciary duty owed to plaintiffs," and accordingly dismissed the Complaint for lack of federal jurisdiction under *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) (App C, 33a-34a).

The Court of Appeals unanimously affirmed without opinion on the basis of the district court decisions (App A, 1a-2a).

REASONS FOR DENYING THE WRIT

The antitrust and securities claims alleged in the Complaint are the sort that can be conjured up in response to virtually any major corporate purchase of shares. It is hardly surprising, therefore, that courts have consistently held similar allegations insufficient to state claims under the federal antitrust and securities laws. The lower courts followed those precedents in ruling on the specific allegations in petitioners' Complaint.

As discussed below, Judge Tenney's and Judge Lowe's decisions, and their unanimous affirmance by the Court of Appeals for the Second Circuit, are fully supported by the relevant case law and create no issue worthy of certiorari.[3]

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3 The Court has previously stated that it will not grant certiorari in cases such as this, where review is sought "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

I. Rejection of Petitioners' *per se* Antitrust Claim Was Consistent with Established Precedent, Created No Conflict with the Decisions of Any Court and Was Correct as a Matter of Logic.

Petitioners seek to convert what is at most a garden variety state law breach of fiduciary duty claim into a Sherman Act treble damage claim simply by attaching a *per se* price-fixing label to respondents' alleged agreement to offer the same price for a portion of Signal's common stock.[4]

But the Court has recently pointed out the impropriety of literally applying, as petitioners seek to do, the Sherman Act's sweeping language:

> [T]his is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price'. As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad. When two

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4 Petitioners stated in the district court that they were alleging a *per se* violation, (App B, 5a), and adhered to that position on appeal. Petitioners' Complaint would be fatally defective under a rule of reason analysis for failure to allege the required adverse effect in a relevant product and geographic market. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). Whether petitioners allege a *per se* or a rule of reason violation is, however, immaterial since, as the courts below held, the antitrust laws do not apply in the first instance to conduct such as that alleged in this case which has no effect on business competition.

> partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9 (1979).

As the Court held in *Broadcast Music*, the critical issue in determining whether conduct constitutes illegal price fixing is whether the challenged practice "threatens the 'central nervous system of the economy,' that is, competitive pricing as the free market's means of allocating resources." 441 U.S. at 23 (citation omitted).

Broadcast Music is consistent with the Court's earlier ruling in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940), that the purpose of the Sherman Act is to prohibit acts and practices which have an adverse effect on business competition—competition in the production and sale of goods and services in a commercial context:

> The end sought [to be achieved] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . . 310 U.S. at 493.

Employing similar reasoning, the courts have consistently recognized that the Sherman Act was never intended to regulate the price for stock received by investors who are not engaged in the securities industry and have repeatedly refused to transform into antitrust claims allegations of conspiracy to manipulate or fix the

price of securities.[5] *Schaefer v. First Nat'l. Bank*, 326 F. Supp. 1186 (N.D. Ill. 1971), *aff'd*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (schemes to rig the price of a particular stock do not restrain trade or commerce within the meaning of the Sherman Act); *Normann v. Vickers Energy Corp.*, 427 F. Supp. 1208 (N.D. Ill. 1977) (allegations by minority shareholders of target that the tender offeror—the target's majority shareholder—had conspired with the target and its management to fix the price of, and monopolize trading in, the target's shares failed to state claim under Sections 1 and 2 of the Sherman Act); *Madison Fund, Inc. v. Charter Co.*, 406 F. Supp. 749, 751 (S.D.N.Y. 1975) (Sherman Act could not be "stretched" to accommodate conspiracy to refuse to register restricted stock in order to eliminate competition with registered stock offering); *Passerieux v. Time, Inc.*, [1974-75] Fed. Sec. L. Rep. (CCH) ¶ 94,805 (S.D.N.Y. 1974) (conspiracy by majority shareholders to depress value of a publicly held stock so as to facilitate the purchase of minority interests at an unfair price did not state a Sherman Act claim because it did not involve a restraint of trade in any relevant market). *See also Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 294-95 (2d Cir. 1958) (L. Hand, J.) (rejecting as beyond the scope of the antitrust laws a

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5 In a wide variety of other contexts, the courts have similarly ruled that the Sherman Act provides no remedy for social or economic evils unrelated to the suppression of business competition. *E.g.*, *In re Multi-district Vehicle Air Pollution Lit.*, 538 F.2d 231, 234, 236 (9th Cir. 1976) (environmental violations); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-7 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 871 (1971) (labor boycotts); *NAACP v. New York Clearing House Ass'n*, 431 F. Supp. 405, 411 (S.D.N.Y. 1977) (sexual or racial discrimination).

claim that defendants had conspired to stifle bids to purchase the plaintiff's stock).

The decision on this issue below was entirely consistent with the rejection of similar antitrust claims in the foregoing authorities. Nor, as the district court recognized, (App B, 9a), have petitioners cited any contrary authority applying the antitrust laws "to deception or overreaching between the potential purchasers or sellers of publicly traded shares of a particular issuer." Instead, petitioners seek certiorari on the ground that the decisions below are "directly contradictory" to *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975) (Pet at 10).

The alleged conflict simply does not exist. *NASD* did not address the issue presented in this case—whether the antitrust laws apply in the first instance to matters not affecting "business competition." Rather, *NASD* dealt solely with whether the antitrust laws, as they apply to certain industry-wide practices of underwriters and brokers, are impliedly repealed by provisions of the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq*. Moreover, *NASD* (like the only other securities cases cited by petitioners—*Morgan*, *Gordon* and the 1945 SEC decision in another *NASD* case) involved alleged anti-competitive practices of persons engaged in the investment banking or securities *business*, not, as in this case, purchases of the stock of a particular issuer by two investors not so engaged. As the district court observed, (App B, 8a):

> In none of [petitioners'] cases was the pricing of an individual issuer's shares the subject of antitrust scrutiny; all pertained to industry-wide practices affecting some aspect of the general distribution of

> shares or to some unfair restraint of a business organization engaged in the brokering of shares to the public.

This conclusion is correct, and nothing respondents are said to have done remotely relates to the Sherman Act's concern with the integrity of business competition. Petitioners nowhere allege that respondents' tender offers had any adverse impact on the business operations or competitive vitality of Signal, or on the state of competition in the industries in which or with which Signal does business. The only adverse effect which petitioners assert is that they might have received a higher price for their shares if a bidding war had developed between Signal and Gulf + Western. But, as the cited cases indicate, it is simply not the purpose of the Sherman Act to ensure to investors in a particular company the benefits of a bidding war. Thus, the court below stood on firm ground in concluding that petitioners' antitrust allegations did not state a claim:

> . . . [T]he thrust of the [Sherman Act] is to prevent impermissible diminution of business competition in a relevant market segment of the general trade or business of the nation. The Sherman Act is not applied except to 'restraint upon commercial competition in the marketing of goods or services.'
>
> The purchase and sale of shares by an investor does not fit comfortably within this definition. Much less does the mere offer to purchase. A seller of the shares of a particular issuer is not engaged in the business of selling such shares as an ongoing trade, and the offeror or consortium of offerors is not the only market for the shares. (citations omitted) (App B, 7a).

Acceptance of petitioners' antitrust theory not only would be inconsistent with the decided cases and with the purposes of the Sherman Act, but also would extend the *per se* rules of the Sherman Act to a multitude of securities transactions which neither Congress, the Justice Department, the SEC nor the courts have indicated the slightest intention to prohibit.

Petitioners' theory is that, by effecting the joint purchase of securities, participants in such transactions *ipso facto* eliminate each other as real or potential competitors, restrain competition and "fix the price" of the securities they purchase in *per se* violation of Section 1. However, this theory would cover not only all joint tender offers but also routine joint purchases of stock by groups of investors outside the confines of tender offers. As the district court observed:

> By parity of plaintiffs' reasoning the offer to purchase any ongoing business at an agreed-on price by a group of persons would also be an illegal restraint of trade, and by force of any logic that theory is not only absurd but arguably one which itself fosters restraint of trade by forcing out of the investment capital marketplace any but those who have the resources to make an independent offer for control. (App B, 14a)

Petitioners' antitrust theory would lead to equally absurd results under Section 2 of the Sherman Act. If petitioners' position that trading in the common stock of Signal constitutes a relevant product market, competition in which is deserving of the protection of the Sherman Act, were accepted, then it would follow inevitably that the acquisition of all or substantially all of the stock of a

company, pursuant to a tender offer or otherwise, would constitute monopolization or an attempt to monopolize that product market in violation of Section 2. Such a conclusion, which would absolutely prohibit tender offers for all or substantially all of a company's stock, would be both absurd in light of the purposes of the Sherman Act and inconsistent with the Williams Act. *See* p. 17 n.8, *infra*; *Normann v. Vickers Energy Corp.*, *supra*, 427 F. Supp. at 1210 n.5. Since Gulf + Western surely was not prohibited by Section 2 from acquiring *all* of the common stock of Signal and thus completely eliminating trading in the "market" for Signal stock, it is inconceivable that price competition in the purchase and sale of a *portion* of Signal stock is intended to be protected by Section 1.

Petitioners' professed concern that the antitrust laws are essential to protect the "investment public" (Pet at 9-10, 12) not only overlooks the protection afforded by state law, but also completely disregards the fact that Congress has delegated broad authority to the SEC to regulate the pricing of securities in general and the fixing of joint tender offer prices in particular. This broad delegation of authority evidences Congress' "judgment of the Commission's competence to assume the central role in assuring investor protection." *Gordon v. New York Stock Exchange*, 498 F.2d 1303, 1307 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975).

Thus, Congress in Section 9 of the Exchange Act, 15 U.S.C. § 78i ("Prohibition Against Manipulation of Security Prices"), specifically addressed pricing practices in securities transactions. Section 9(a)(6) gives the SEC authority to adopt such rules and regulations as it deems necessary to protect investors from the very forms of

price manipulation which, in contexts not involving securities, have been held subject to the Sherman Act, namely, "pegging, *fixing* or stabilizing" the price of a listed security (emphasis added).[6] Significantly, the SEC has not promulgated regulations pursuant to Section 9 which would prohibit joint tender offers by two offerors at the same price.

In the Williams Act amendments to Sections 13 and 14 of the Exchange Act, Congress granted the SEC additional authority to protect investors during tender offers. Again, however, neither Congress in enacting the Williams Act nor the SEC in promulgating regulations thereunder has chosen to prohibit joint tender offers by two offerors at the same price. To the contrary, the Williams Act leaves no doubt that Congress envisaged tender offers being made by groups of persons or corporations at the same price: "perusal of the '34 Act—particularly those sections related to tender offers—demonstrates that the Congress fully contemplated combinations of purchasers in a tender offer such as was made here" (App B, 13a). Thus, Section 14(d)(2) of the Williams Act defines a "person" subject to the tender offer provisions to include a "group" acting together with the common purpose of acquiring or holding shares of an issuer,[7] and the legislative history of the Williams

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6 In describing the types of price manipulation subject to its provisions, Section 9(a)(6) tracks *in haec verba* the classic language—"raising, depressing, fixing, pegging or stabilizing" prices—which the Court used in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), to describe the various forms of price-fixing prohibited by the Sherman Act.

7 Section 14(d)(2) of the Exchange Act is reprinted in the Appendix to this Brief.

Act confirms that Congress expressly contemplated joint tender offers.[8]

Moreover, far from seeking to stimulate bidding wars of the type sought by petitioners, Congress required all members of a group making a tender offer to offer one uniform price to all tendering shareholders. This result is mandated by Section 14(d)(7) of the Williams Act,[9] which provides that if one member of a group constituting a "person" raises its offering price, all shareholders who have tendered previously to any member of the group must receive the benefit of the higher price. As Judge Tenney observed, Congress could hardly have been "so addlepated as to have carefully legislated regulatory procedures for an activity [the uniform pricing of group tender offers] it elsewhere forbade. . . ." (App B, 14a).

II. Petitioners' Claim that the Court of Appeals Was "Inattentive" in Reviewing Discretionary Rulings of the District Court Is Baseless.

Petitioners claim that the affirmance without opinion of various discretionary rulings by District Judge Lowe represented "a degree of inattentiveness calling for the supervision of the Supreme Court" (Pet at 16).Not

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8 Senator Harrison Williams, the principal sponsor of the legislation, offered this comment during the congressional debate:

> "There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a *group* which may wish to obtain a controlling interest." 113 Cong. Rec. 2465 (1967) (emphasis added).

9 Reprinted in the Appendix to this Brief.

content with accusing the Court of Appeals of inattentiveness, petitioners state that it "did not examine this matter with the minimum of care required to understand the . . . facts." (*Id.*) This claim is preposterous, and the fact that it is made at all reflects the lack of merit in the entire Petition.

The district court rulings in question raised no serious legal issue but rather involved petitioners' quarrels with Judge Lowe over the proper interpretation of the Complaint, her resort to the full text of the Offers To Purchase[10] and whether petitioners had been given an adequate opportunity to amend the Complaint and present their case. These arguments were reraised in the Court of Appeals at great length. Indeed, the Court of Appeals gave petitioners every conceivable opportunity to make their arguments as forcefully and completely as they desired. Petitioners' motion to file an oversize brief was granted, as was their motion for additional time to file a reply brief, and their motion to increase their time for oral argument. Disposition of the appeal on the basis of the careful district court opinions was perfectly appropriate, particularly since this case does not raise any novel or important issues.

Furthermore, petitioners badly distort the record when they suggest that they were deprived of an opportunity to amend or to present argument. Judge Tenney's opinion stated that in light of the dismissal of petitioners' antitrust allegations, it was "incumbent" on them to apprise the court "of the particular material misstatements or omissions" they relied upon in charging a securities law violation (App B, 16a). Petitioners never complied with this invitation, if not direction, to amend

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10 The full text of the Offers to Purchase was attached to the Answer.

the Complaint. When, more than a year later, respondents made their motion before Judge Lowe, petitioners, as they have conceded (Pet at 13), fully argued all of the "new" allegations which they now claim they would have added in an amended complaint. Indeed, Judge Lowe entertained five rounds of post-argument submissions which contained all the claims petitioners now allege they were not permitted to add to their Complaint and that Judge Lowe failed to consider.[11]

Judge Lowe's opinion neither "ignores" these arguments nor falsely states that she allowed amendment of the Complaint. Rather, it establishes that she specifically considered these arguments and found them insufficient:

> . . . After considering this submission and *other post-argument submissions* by the parties the Court is of the opinion that the proposed amended complaint similarly fails to state a claim for relief under the securities laws. In light of this, *a formal amendment of the complaint would be futile.* (emphasis added, citations omitted) (App C, 22an)

In short, Judge Lowe heard and considered all the arguments petitioners sought to add to their Complaint and determined that it would still fail to state a claim under the federal securities laws. The Court of Appeals, to whom petitioners made all the same arguments they have made in their Petition to this Court, reached the same conclusion, and there is no basis for reviewing that decision on certiorari.

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11 For example, in a letter to the court dated May 9, 1979, petitioners argued that respondents' press release of April 12, 1976 was false and misleading. Similarly, in a letter dated May 15, 1979, petitioners reargued the proposition that respondents' acts violated Rule 14d-1, and contained a "false statement of purpose."

III. Dismissal of Petitioners' Securities Law Claims Was Based upon the Application of Established Precedents to the Particular Facts of This Case and Provides No Basis for Certiorari.

Petitioners' final argument, that the decision below misinterprets *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), is based on a mischaracterization of Judge Lowe's opinion. Contrary to petitioners' contention, Judge Lowe did *not* hold that an otherwise material omission is not cognizable under the federal securities laws if it is also a breach of fiduciary duty. Rather, she held, on the basis of substantial precedent and in light of the disclosures made in the Offer to Purchase, that the four specific matters alleged in the Complaint were not required to be disclosed under the federal securities laws. She then went on to find that the remainder of the Complaint alleged, at most, a state law claim for breach of fiduciary duty, and was subject to dismissal under *Santa Fe*. Accordingly, the district court decision in this case neither conflicts with nor misinterprets *Santa Fe*, but simply applies the legal standard enunciated in that case to the specific allegations of petitioners' Complaint.

Petitioners also disingenuously attempt to manufacture a conflict between circuits where no such conflict exists. For the first time, petitioners argue that *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978), which they did not even cite below, directly conflicts with the decision in this case. However, *SEC v. Blatt* simply applies the same legal standards to an entirely different factual situation. Here, as Judge Lowe found, all the facts relating to the tender offers were fully disclosed. Among other things, the Offers To Purchase expressly stated: "Signal believes that no officer or director intends to tender his shares."

Petitioners never challenged the truthfulness of this statement. In contrast, the Fifth Circuit held in *Blatt* that the securities laws were violated by counsel to a corporation which was to be merged into another corporation, precisely because he did *not* disclose to the acquiring corporation that he opposed the merger and beneficially owned shares in the target corporation.[12]

Judge Lowe's decision did not diverge from the legal standards applied in either *Santa Fe* or *Blatt*. Rather, she considered each of the four nondisclosure claims alleged in the Complaint (which bore no resemblance to the nondisclosures alleged in *Blatt*), and found that, in light of the facts disclosed in the Offer To Purchase, none of the additional disclosures petitioners sought were required.

For example, Judge Lowe held that defendants did not have to disclose that their alleged "true purpose" was to entrench the control of Signal's management, because all the *facts* concerning the agreement between Signal and Gulf + Western, including the added support it would give to Signal management, were fully disclosed (App C, 25a-26a). In so holding, she followed numerous precedents which state that, under such circumstances, there is no need to disclose management's subjective entrenchment motivation. *See, e.g., Rodman v. Grant Foundation*, 608 F.2d 64, 70-72 (2d Cir. 1979); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 803 (2d Cir.), *cert. denied*, 400 U.S. 822 (1969); *Biesenbach v.*

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12 The Fifth Circuit held that "under the unique circumstances of this case", had such counsel disclosed his opposition to the merger and his ownership interest, the acquiring corporation would then have had a duty to disclose these facts to shareholders of the corporation which was to be merged. 583 F.2d at 1332.

Guenther, 588 F.2d 400, 402 (3d Cir. 1978); *Golub v. PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978).

Judge Lowe also followed established precedent in holding that, since the market price of Signal stock was fully disclosed, there was no need to disclose any subjective belief management may have had that the $20 per share price was inadequate (App C, 27a-28a). *Rodman v. Grant Foundation*, *supra*, 608 F.2d at 72; *Goldberger v. Baker*, 442 F. Supp. 659, 664-65 (S.D.N.Y. 1977); *Valente v. Pepsico, Inc.*, 454 F. Supp. 1228, 1254 (D. Del 1978). Petitioners' claim that Gulf + Western might have offered a higher price per share if it had not agreed to support Signal's management is merely a composite of their "true purpose" and "inadequate price" claims and was similarly rejected. In addition, as Judge Lowe correctly noted, mere "speculative possibilities" do not require disclosure (App C, 31a). *Seibert v. Sperry Rand Corp.*, 586 F.2d 949 (2d Cir. 1978); *Susquehanna Corp. v. Pan American Sulphur Co.*, 423 F.2d 1075, 1085-86 (5th Cir. 1970).

Finally, Judge Lowe held insufficient the claim that respondents failed to disclose that other companies were "interested" in Signal, following the well-established rule that mere "interest" by another company in a possible acquisition is not a sufficiently definite fact to require disclosure (App C, 29a-30a).[13] *Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978); *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 65

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13 The only company petitioners ever alleged had such an interest was Dresser Industries, Inc. Once Dresser made an actual acquisition proposal, however, it was fully disclosed by Signal in a press release dated May 26, 1976, and the Petition does not challenge the adequacy of that disclosure.

(D.N.J. 1974); *Alameda Oil Co. v. Ideal Basic Industries, Inc.*, 337 F. Supp. 194, 195 (D. Colo. 1972); *Elgin National Industries, Inc. v. Chemetron Corp.*, 299 F. Supp. 367, 371 (D. Del. 1969); *United States Smelting, Refining & Mining Co. v. Clevite Corp.* [1969-70 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 92,691 at 99,040-51 (N.D. Ohio 1968).

In short, the district court applied well-established principles of securities law to the specific nondisclosure claims in petitioners' Complaint, and determined that the Complaint failed to state a federal claim. The Court of Appeals, recognizing the correctness of the legal analysis applied, affirmed without opinion. Since the district court opinion does not raise any legal issues which have not already been extensively treated by this Court and the lower courts, it provides no basis for certiorari.

Conclusion

For all the foregoing reasons, respondents respectfully suggest that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Sherman Act

§ 2, 15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Securities Exchange Act of 1934

§ 9(a)(6), 15 U.S.C. § 78i(a)(6)

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 14(d)(2), 15 U.S.C. § 78n(d)(2)

When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

§ 14(d)(7), 15 U.S.C. § 78n(d)(7)

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.